United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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Pls

ORIGINAL

74-1218

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1218, 1265, 1266, 1354, 1438

In the Matter of the Complaint

of

COMPANIA NAVIERA EPSILON, S.A. Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS, for exoneration from or limitation of liability.

COMPANIA NAVIERA EPSILON, S.A. Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS,

Appellant,

69 Civ. 5303

BINGHAM & COMPANY, et al.,

Plaintiffs-Appellants,

against

THOS. & JNO. BROCKLEBANK, LTD.,

Defendant-Appellee,

70 Civ. 290

KELLER INDUSTRIES INC.,

Plaintiff-Appellant,

against

THOS. & JNO. BROCKLEBANK, LTD. et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUGGESTION FOR REHEARING EN BANC AND PETITION FOR REHEARING ON BEHALF OF PLAINTIFF-APPELLANT KELLER INDUSTRIES INC.

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SUGGESTION FOR REHEARING EN BANC AND PETITION FOR REHEARING ON BEHALF OF PLAINTIFF-APPELLANT KELLER INDUSTRIES INC.

Appellant, Keller Industries, Inc. respectfully Petitions for a rehearing and Suggests that a rehearing in banc would be appropriate for so much of the judgment of this Court, dated November 12, 1974, as affirmed "on the opinion of the Honorable Marvin E. Frankel, DJ" the part of the District Court's judgment which awarded charterer-appellee freight charges for the carriage of appellant Keller's cargo,—despite the fact that appellant Keller's cargo was shipped under "freight payable at destination" bills of lading, (299a)—and was lost because of the Master's negligent navigation.

The grounds upon which such rehearing in banc is suggested are:

1. Consideration by the full Court is necessary to maintain uniformity of its decisions.

2. The question is one of exceptional importance to ocean shippers and carriers.

It is also respectfully suggested that the decision on this point is not in accord with maritime law. (All the above points will be covered under the following heading.)

Consideration by the Full Court is Necessary to Maintain Uniformity of its Decisions

In *J. Howard Smith Inc.* v. *S.S. Maranon,* 501 F.2d 1275 at p. 1279, this Court by Circuit Judges Lumbard, Hays, and District Judge Jameson said in July, 1974 that in the absence of a "Jason Clause" the "ship at fault has no right to general average contribution,"—the Court saying:

> "However, the bills of lading in this case did not contain a Jason clause, and the case is therefore con-

trolled by the traditional rule that the ship at fault has no right to general average contribution. The Irrawaddy 171 U.S. 187, 18 S.Ct. 831, 43 L.Ed. 130 (1898) G. Gilmore & C. Black, The Law of Admiralty § 5-13 (1957)."

The "Jason clause" is simply a bill of lading clause which in effect states that a duly diligent carrier may collect general average contributions from cargo whether the accident resulting in the general average was "due to negligence or not".* The words "whether due to negligence or not" in the Jason clause permit a duly diligent carrier to recover contributions from cargo where the vessel's negligence caused the accident which resulted in the general average. In the absence of such clause,—as this Court said in the *SS Maranon* (*supra*), "the ship at fault has no right to general average contribution."

It is destructive of the uniformity of this Court's decisions on the Maritime law to hold in the *SS Maranon* case that a duly diligent carrier can *not* recover general average contributions resulting from vessel fault in the absence of a Jason (negligence) clause in its bill of lading,—and to hold in the instant *"M.S. Nicholaos S. Embiricos"* case that such a carrier *can* recover freight on cargo lost by vessel negligence when its "earned freight" clause does not provide for recovering freight on cargo lost by vessel negligence.

Both interpretations depend on this Court's decision as to C.O.G.S.A.'s "policy" with respect to the right of a duly diligent carrier to make affirmative recoveries from its cargo, following an accident caused by vessel negligence.

In the *SS Maranon* (*supra*), this Court is saying that C.O.G.S.A.'s "policy" does *not* permit such general average recoveries without a Jason (negligence) clause in the carrier's bill of lading.

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* "In the event of an accident . . . from any cause . . ., *whether due to negligence or not*, . . . for which the carrier is not responsible by statute. . . ." (emphasis added) (301a)

In the instant (*Nicolaos S. Embiricos*), the District Court, (whose opinion this Court has adopted), is saying that C.O.G.S.A. *does* permit such freight recoveries without a negligence clause. The District Court's holding was that

> ". . . it is essentially at war with COGSA's policy and, therefore, unacceptable" (109A)

for such carrier *not* to recover such freight on cargo lost by the vessel's negligence even though its "freight earned" bill of lading clause did not provide for freight recoveries on cargo lost by vessel negligence (108A-109A).

Why is COGSA's policy, (in cases of duly diligent carriers who lack a negligence clause in their bill of lading), "at war" with not permitting freight recoveries on cargo lost by vessel negligence, and at peace with not permitting recoveries of contributions to general average resulting from vessel negligence?

In the *Irrawaddy*, 171 U.S. 187, 43 L.Ed. 130 (1898), the District Court for the Southern District of New York (reasoning like the District Court below) permitted the duly diligent carrier, with no Jason (negligence) clause in its bill of lading, to recover general average contributions following the vessel's negligent stranding. Like the Court below Judge Addison Brown felt that the "policy" of the Harter Act required such result.

> ". . . the exemption which the act is evidently designed to afford to the ship owner from his previous responsibility to the cargo owner, should be given its full natural scope and effect, without abridgement by any arbitrary or narrow construction that is not warranted by anything apparent in the context or from the evident object of the statute."
>
> "'The whole object of the act,' says Mr. Justice Brown in The Delaware, 161 U.S. 459, 16 Sup.Ct. 516, 'is to modify the relation previously existing between the vessel and her cargo', and to fix that relation,

that is, a relation of non responsibility for damages or losses arising out of bad navigation. Such a statutory change in a broad principle of law must carry with it other changes as its necessary accompaniment. In abolishing the previous responsibility of the ship and owner, the intent of the statute must be presumed to be to abolish also whatever is immediately dependent upon that responsibility. In no other way can the statute have its fair and natural effect".

Chrystal et al. v. *Flint et al.* (The IRRAWADDY), 82 F.472 (1897) (S.D.N.Y.) (Brown, D.J.) at p. 476.

On appeal, this Court simply certified the following question to the Supreme Court. *Flint* v. *Chrystal* (88 F. 987) (CCA 2d)

"If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the ship owner, who has exercised due deligence to make his vessel in all respects seaworthy, properly manned, equipped, and supplied, under the provisions of section 3 of the act of February 13, 1895, a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight, and cargo?"

Flint, Eddy & Co. v. *Christall,* 171 U.S. 187 (1898) at pp. 188-189.

The Supreme Court reversed the District Court, saying at pp. 194-5

". . . for the courts to declare, as a consequence of this legislation, (i.e. Harter Act) that the shipowner is not only relieved from liability for the negligence of his servants, but is entitled to share in a general average

rendered necessary by that negligence, would be in the nature of a legislative act. The act in question (i.e. Harter Act) does, undoubtedly modify the public policy as previously declared by the courts, but if Congress had intended to grant the further privilege now contended for, it would have expressed such an intention in unmistakable terms. *It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew".* (emphasis added)

Flint, Eddy & Co. v. *Christall,* 171 U.S. 187 (1898) at pp. 194-5.

In the subsequent *Jason* case, (225 U.S. 32) where the duly diligent carrier had a Jason (negligence) clause in its bill of lading which provided that cargo shall contribute in general average whether resulting from negligent navigation or not, the Supreme Court held that the negligent vessel *could* recover general average contributions following a negligent stranding. The Court said:

"The point of the decision in the IRRAWADDY . . . is that while the Harter Act relieved the shipowner from liability for his servant's negligence, it did not of its own force entitle him to share in a general average rendered necessary by such negligence." (p. 54)

The Court went on to say:

"In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him *to contract* with the cargo owners *for a participation in general average contribution growing out of such negligence."* (emphasis added) (pp. 55-6)

Thus the effect and policy of the Harter Act, and of COGSA is that a duly diligent carrier may make affirmative recoveries from its cargo in a general average caused by vessel fault, or of freight on cargo lost by vessel fault, *only* when such carrier has an appropriate *negligence* clause covering such vessel fault in its bill of lading.

Appellee-Brocklebank's "earned freight" clause is not such a negligence clause and Appellant-Keller's Brief at pp. 12-18 covers the authorities holding that "exemptions contained in bills of lading are never construed to cover the negligence or default of the carrier unless that is expressly stipulated for".

The underlying maritime law which caused the Supreme Court in the *Irrawaddy* (*supra*) to require a Jason (negligence) clause was stated to be:

> "We shall first inquire why it is that, apart from the act in question, the owner of the ship is not entitled to a general average contribution where the loss was occasioned by the fault of the master or crew, and we find the rule is founded on the principle that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of someone for whose acts the claimant has made himself, or is made by law, responsible to the contributors."
>
> 171 U.S. 187 at p. 189.

The underlying maritime law as to freight which should also cause this Court to require a negligence clause before permitting a duly diligent carrier to recover freight on cargo lost by vessel negligence has been somewhat obscured by the more apparent, traditional freight rule, which is that

> ". . . under the general maritime law of carriage he (the carrier) cannot collect it (freight) unless the

goods are delivered to their destination, so that the loss of the goods entails the loss of the freight as well".

Law of Admiralty Gilmore & Black, at p. 221.

Since most of the early cases involving freight questions were decided under this more apparent rule,* there was not much occasion to consider the *other* rule which is that a carrier can not recover freight on cargo lost by its negligence.

In order to get around the more apparent rule cited by Gilmore & Black, carriers have since prior to the First World War been inserting "freight earned" clauses in their bills of lading. This clause enables the carrier to recover freight on cargo lost or non-delivered without any vessel fault or negligence. Appellant, Keller's Brief and Reply Brief have shown that in no case cited by Appellee-Brocklebank in which a carrier with a "freight earned" clause in its bill of lading has been permitted to recover freight on lost or non-delivered cargo was there any finding that the loss or non-delivery was due to vessel fault or negligence.

The other freight rule which, like the *Irrawaddy* rule requires a negligence clause before freight on cargo lost by vessel negligence can be recovered, is the rule that a carrier can not recover freight on cargo lost or non-delivered due to vessel negligence. The following authorities support this rule:

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* For example see *Fleishman* v. *The John P. Best,* 9 F. Cas. 260 (Case No. 4861) (U.S. District Ct. E.D. Pa. 1879) where two-thirds of the cattle on a voyage were lost by sea perils and one-third were lost by vessel negligence. The Court held that the carrier was:

a) Not liable for the two-thirds of the cattle lost by sea perils,—

b) Liable for the one-third of the cattle lost by vessel negligence,—and

c) Liable to return the *freight* on *all* the cattle lost.

"There is a general rule of law that common carriers cannot stipulate for immunity from their own or their agents negligence".

United States v. *Atlantic Mut. Ins. Co.,* 343 U.S. 236 (1951) at p. 239

Before the introduction of the "due diligence" rules by the Harter Act and by C.O.G.S.A.,—cargo recoveries were based on simple vessel negligence,—and their recoveries then, as now, were measured by market value at destination which includes ocean freight as an element thereof,—similarly, where recoveries were for the C.I.F. value.

However, in *The Hugo,* where on the same voyage, 66 cattle were destroyed by sea perils and 63 cattle were lost overboard by negligence, the District Court for this District held the carrier liable for the 63 cattle negligently lost overboard *and for the freight on those 63 cattle.* Judge Brown saying:

"I think the libelants are entitled to recover, in addition to the market price in New York, as fixed by the commissioner, *the advanced freight* also on the 63 cattle lost. . . . The exceptions in the bill of lading do not extend to cases of losses by negligence, or misconduct as is here found in regard to the 63 cattle; though they do apply to the residue of the loss through sea perils". (emphasis added)

The Hugo, 61 Fed. 860 (S.D.N.Y.) (1894) (See also same case at 57 Fed. 403 (1893) (S.D.N.Y.) Affirmed at *Brauer et al.* v. *Campania Navigacion La Fleeha,* 66 Fed. 776 (CCA 2d) (1895).

See also 80 C.J.S. at p. 1069 which states:

"However, even through the bill of lading calls for payment of freight 'ship lost or not lost', if the goods are so damaged by the carrier's negligence that they can not be delivered in specie freight is not recoverable."

On the other hand when goods arrived at destination in the same worthless condition but *without vessel negligence or fault,* freight is collectible.

See *Lawrence* v. *Denbreens,* 66 U.S. 170 (1862) where a brig with a cargo of lemons and oranges encountered "heavy gales" and had to put in for repairs at Lisbon. While there, the fruit was unloaded, and examined. 414 boxes were discarded as decayed, and the rest repacked and reloaded. On final delivery in New York nearly all the fruit was in a very damaged and decayed condition.*

The headnote of the Supreme Court decision states:

> "The owners of the vessel, having established the fact that the loss and decay of the fruit *were not occasioned by the fault of the master,* were entitled to recover for the freight on all that portion of the cargo that was duly transported and delivered". (emphasis added)

and the Court said at p. 178:

> "They (shipowners) *having established the fact that the loss and decay of the fruit were not occasioned by the fault of the master,* were clearly entitled to recover for the freight on all that portion of the cargo that was duly transported and delivered". (emphasis added)

See also the statement of Judge Addison Brown in *Gibson* v. *Brown,* 44 Fed. 98 S.D.N.Y. (1890) at p. 99:

> "No doubt, where a lump sum is specified as the freight to be paid on delivery, whether by charter party or bill of lading, the consignee accepting the goods must pay the stipulated sum without deduction for what may be lost *without the fault of the ship.* This rule is applied because it is inferred from the language of the bill of lading or charter-party that the parties intended that the ship should receive the particular lump sum

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* The lower court decision is *De Bruns* v. *Lawrence,* Case No. 3, 716; 7 Fed. Cas. 312 Circ.Ct. S.D.N.Y. (1859).

> stipulated for her services, without incurring any risk of loss on freight through a loss of part of the goods *without her fault.*" (Emphasis added)

See also statement by this Court in the *Quarrington Court* (C.C.A.2d) 122 F.2d 255, 1941 A.M.C. 1234 at p. 1237, where this Court said:

> "The cases cited by Isthmian to support the view that it was bound to return the freight hold only that a special freight stipulation as here ["freight earned" clause] is ineffective if the loss was due to the carrier's negligence. See THE WILLDOMINO, 1924 A.M.C. 889, 300 Fed. 5, 21 (3 CCA), aff'd 1927 A.M.C. 129, 272 U.S. 718. As has been shown, no negligence was established."

See also the three District Court cases from the Southern District of New York, cited at pps. 4-5 of Appellant Keller's Brief, where, in separate opinions, Judges Leibell, Metzner and Herlands, each said that under the common carrier's "freight earned" clause (without a negligence provision) freight is recoverable *only* where the loss is not due to the negligence of the carrier.

Conclusion

Based upon the foregoing, it is respectfully suggested that a rehearing *in banc* should be held by this Court on whether the freight on Appellant-Keller's cargo, shipped on "freight payable at destination" bills of lading (299a) and lost by the Master's negligence, is collectible without a negligence clause in the bills of lading.

Dated: November 25, 1974.

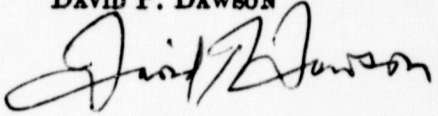
Respectfully submitted,

DAVID P. DAWSON
Attorney for Plaintiff-Appellant
Keller Industries Inc.

Certificate of Counsel

I, David P. Dawson, attorney for Appellant, Keller Industries, Inc. in this action, do hereby certify that the foregoing is presented in good faith and not for the purpose of delay.

DAVID P. DAWSON



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Certificate of Counsel

I, David P. Dawson, attorney for Appellant, Keller Industries, Inc. in this action, do hereby certify that the foregoing is presented in good faith and not for the purpose of delay.

DAVID P. DAWSON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of the Complaint of

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS, for exoneration from or limitation of liability.

COMPANIA NAVIERA EPSILON, S.A., ETC.,

Appellant.

KELLER INDUSTRIES INC.,

Plaintiff-Appellant

vs.

THOS. & JNO. BROCKLEBANK LTD., et al.

Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 26th day of November, 1974, he served two copies of Petition for Rehearing on See attached list, the attorneys for See attached list by delivering to and leaving same with a proper person in charge of their office at See attached list in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
26th day of November, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
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